(3)

Supreme Court, U.S.
FILED
JAN 20 1995
OFFICE OF THE CLERK

No. 94-1062

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1994

Stephen D. McCullough,

Petitioner

v.

Branch Banking & Trust Company, Inc.,

Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITIONER'S REPLY MEMORANDUM

by Stephen D. McCullough, pro se

271 N.E. 38th Street

Oakland Park, FL. 33334

(305) 564-4533

BEST AVAILABLE COPY

19 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
REASONS FOR GRANTING THE PETITION	2
I. The Decision of the Court of Appeals is Erroneous	2
II. The Case is Important	10
III. The Petition was Properly Filed	11
CONCLUSION	14

TABLE OF AUTHORITIES

Case Authority	Page
Burnett v. Grattan, 468 U.S. 42 (1984)	4
DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151 (1983)	7, 8, 9
McCullough v. Branch Banking & Trust Co., Inc., 35 F.3d 127 (4th Cir. 1994)	3, 5
Reed v. United Transp. Union, 488 U.S. 319 (1989).	7
Steelworkers v. Crown Cork & Seal, cert. granted, U.S. Supreme Court Case No. 94-835	9
Wilson v. Garcia 471 U.S. 261, 105 S.Ct. 1938, 85, L.Ed. 254 (1985)	2, 3, 4, 6, 8, 9
Wolsky v. Medical College of Hampton Roads 1 F.3d 222 (4th Cir. 1993) cert. denied ___ U.S. ___, 114 S.Ct. 881, 127 L.Ed. 2d 77 (1994). . .	10

Constitutional Provisions

United States Constitution, Amendment XIV section 1 . . . . . 5, 6

Federal Statutes

28 U.S.C. § 1367(c) 7

29 U.S.C. § 794 . . . . . 4, 5

42 U.S.C. § 1983 9

42 U.S.C. § 1988 . . . 2, 4, 7, 11

N.C. State Statutes

N.C. Gen. Stat. § 168A-11(c). . 5, 7. . . . . 10, 11

N.C. Gen. Stat. § 168A-12. . . 4, 12

Virginia State Statute

Va. Code Ann. sec. 51.5-40 et. seq . 10

No. 94-1062

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1994

Stephen D. McCullough,

Petitioner

v.

Branch Banking & Trust Company, Inc.,

Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

PETITIONER'S REPLY MEMORANDUM

REASONS FOR GRANTING THE PETITION

I. The Decision of the Court of Appeals is Erroneous and in Distinct Conflict with the Principles in the U.S. Supreme Court's Decision in the case of Wilson v. Garcia, 471 U.S. 261, (1985).

Both the Fourth Circuit and the Respondent rewrite the principal admonition of 42 U.S.C §1988; that limitation periods of state statutes are properly applied to federal civil rights actions only when the state statute from which the limitations period is borrowed **"is not inconsistent with the Constitution and laws of the United States."** The Respondent accurately quotes the Fourth Circuit's interpretation of that admonition as

> [T]he court should then consider whether application of that limitations period

> is consistent with the federal statute and its underlying policies.

McCullough, 35 F.3d at 129 and Respondent's Brief in Opposition at page 9. Also,

> [W]e now consider whether application of the 180-day statute of limitations contained within the North Carolina (Handicapped Persons Protection) Act is consistent with the federal policies underlying the Rehabilitation Act.

McCullough, 35 F.3d at 131 **misquoting** Wilson, at 266-67 ("When Congress has not established a time limitation for a federal cause of action, the settled practice has been to adopt a local time limitation as federal law **if it is not inconsistent with federal law or policy**

to do so"). It is this misinterpretation which lies at the heart of this appeal. The instruction in 42 U.S.C §1988 does **not** impose upon a court an obligation to analyze whether the application of a limitations period from a state statute is consistent with the federal statute and its underlying policies. Instead, 42 U.S.C. §1988 requires a court to ensure that the statute from which the limitations period is borrowed "is not inconsistent with the Constitution and laws of the United States." Wilson, at 267 citing Burnett v. Grattan, 468 U.S. 42, 47-48. A review of the record will clearly reveal that Petitioner has argued in the courts below as he argues now; that application of the 180-day statute of limitations found at N.C. Gen. Stat. §168A-12 to a federal Rehabilitation Act claim brought pursuant to 29 U.S.C §794 is inconsistent with

the command in Amdt. §1, U.S. Const. that "No State shall make or enforce any law which shall **abridge** the privileges or immunities of citizens of the United States" (emphasis added) given the forfeiture provision of N.C. Gen. Stat. §168A-11(c) written out verbatim both in the opinion of the Fourth Circuit, McCullough, 35 F.3d at 129, and by Respondent in its Brief in Opposition at page 2.

It is ridiculous to suggest that application of the 180-day statute of limitations in the North Carolina Handicapped Persons Protection Act to federal Rehabilitation Act claims is consistent with the Constitution of the United States only because it does not completely deny a putative plaintiff the right to proceed with a cause of action under 29 U.S.C. §794. The Constitution's requirement is that the

privileges and immunities of citizens of the United States shall not be abridged. Those rights are "abridged" when the application of an identical limitations period forces a putative plaintiff to choose between vindication of his federal or his state civil rights when the definitions and procedures applicable to those rights differ.

Moreover, "The Constitution's command is that all 'persons' shall be accorded the full privileges of citizenship." Wilson, at 277. And Amdt. 14 §1, U.S. Const. clearly establishes that "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." As such, citizens are clearly entitled to the privileges and immunities enacted by the State wherein they reside as well as those enacted at the federal

level.

In addition, it is absurd to suggest that applying a limitations period which does **not** vindicate the forfeiture provision enacted at N.C. Gen. Stat. §168A-11(c) requires the limited resources of the courts to be inefficiently employed. But for that forfeiture provision, 28 U.S.C. §1367(c) allows the courts to invoke pendent jurisdiction.

Respondent notes that, in DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151 (1983), the Court held that "timeliness rules drawn from federal law" may be used under "certain circumstances" as a "closely circumscribed" (see Reed v. United Transp. Union, 488 U.S. 319, 324 (1989)) exception to the procedure dictated by 42 U.S.C. §1988. DelCostello involved an alleged breach of a collective

bargaining agreement and an alleged breach of a union's duty of fair representation, and the "certain circumstance" causing the invocation of timeliness rules from federal law was that the plaintiff's cause of action "ha(d) no close analogy in ordinary state law." DelCostello, 462 U.S. at 151. Given the long history of courts' characterization of federal civil rights actions generally and of Rehabilitation Act claims specifically as claims involving injury to persons as noted both in the original petition and by the Fourth Circuit in the decision being appealed, that "certain circumstance" does not exist in the instant case. And contrary to Respondent's assertion at page 16 of its Brief in Opposition that the Wilson Court held that "there was essentially no analogous state statute" to federal cases brought

pursuant to §1983, the Wilson decision "principally involve(d) the second step of the process: the selection of 'the most appropriate,' or 'the most analogous' state statute of limitations to apply to this §1983 claim." Wilson, at 268. In addition, Petitioner notes that this Court recently granted certiorari in the case of Steelworkers v. Crown Cork & Seal, U.S. Supreme Court Case No. 94-835, in an appeal which will undoubtedly seek to clarify and to narrowly define the "certain circumstances" under which a court may depart from the 42 U.S.C. §1988 procedure pursuant to the holding of the DelCostello Court. In any event, it is certain that the courts are not and will not be endowed with authority to borrow **any** limitations period in a manner that is inconsistent with the Constitution and laws of the United

States.

Finally, Respondent notes that this Court recently denied certiorari in the case of Wolsky v. Medical College of Hampton Roads, 1 F.3d 222 (4th Cir.) cert. denied, ___ U.S. ____, 114 S.Ct 881 (1994). It is important, however, that this Court distinguish the Wolsky case from the Fourth Circuit's decision in the instant case. Wolsky clearly did not involve the constitutional issues raised in this appeal, because the Virginia Rights of Persons with Disabilities Act, Va. Code Ann. §§51.5-40 et. seq., does not contain a forfeiture provision in any way similar to N.C. Gen. Stat. §168A-11(c).

II. The Case is Important

Because the Fourth Circuit took

specific note of the forfeiture provision set forth in N.C. Gen. Stat. §168A-11(c), because they rewrite the requirements of 42 U.S.C. §1988, and because they fail to recognize the predominance of the federal interest in the borrowing process, this case is important to all federal civil rights litigants for all the same reasons that the decision being appealed is erroneous.

III. The Petition For A Writ Of Certiorari Was Properly Filed.

In its Brief in Opposition, Respondent claims that "at all times relevant to this lawsuit, McCullough has been represented by an attorney, Robert J. Willis." As support for this patently false assertion, Respondent cites only "Local Rule 2.07, Eastern

District of North Carolina," which would require leave of the federal district court if an attorney whose appearance had been entered in that court sought to withdraw his appearance as counsel for a litigant still proceeding in that court or if that attorney sought to have his appearance stricken from the record. But Respondent fails to acknowledge that this petition represents an appeal from a decision of the United States **Fourth Circuit** Court of Appeals as opposed to an appeal from the United States District Court for the Eastern District of North Carolina. In fact, the federal district court ruled in petitioner's favor on the Question Presented in this appeal.

Respondent cites no rule from the Fourth Circuit indicative of an assumption that counsel of record for a litigant proceeding in that court

automatically continues as counsel for that litigant if the litigant wishes to petition this Court for a Writ of Certiorari, because no such rule exists. The fact is that Petitioner has never been represented by counsel in connection with this appeal.

Respondent's argument that this petition is "improperly filed" is a blatant attempt to deny a citizen of the United States access to this Court. My petition was properly filed pro se. The certificates of service I have filed are properly drafted in declaratory form and notarized. This Reply is properly filed pro se, and my plea which immediately follows herein is properly made pro se.

It is the very actions of Respondent which form the basis of the litigation underlying this appeal that have depleted my financial resources to the point

where I am able to afford neither professional legal representation nor professional printing services in connection with this petition. My plea to this Court is for nothing more nor less than full and fair consideration.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the original petition, the Petition for a Writ of Certiorari should be granted or, alternatively, this Court should summarily reverse the decision of the United States Court of Appeals for the Fourth Circuit and remand the case for further proceedings.

Respectfully Submitted,

Stephen D. McCullough

Pro Se Petitioner

271 N.E. 38th Street

Oakland Park, FL. 33334

(305) 564-4533